Supreme Court, U.S.
FILED

97 736 OCT 27 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

MICHAEL GENTRY,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

PETITION FOR WRIT OF CERTIORARI

J. RUSSELL HELDMAN
Counsel of Record
WILLIAMS & HELDMAN
Attorneys for Petitioner
320 Main Street
Suite 101
Franklin, Tennessee 37064
(615) 794-7100

72292 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

33pp

QUESTION PRESENTED

Does Article VI, Section 5 of the Tennessee Constitution and Tennessee Code Annotated Section 8-6-101, both of which require the Attorney General of the State of Tennessee to be appointed and thereby employed by the five (5) Judges of the Tennessee Supreme Court, violate a criminal defendant's rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution where a criminal defendant's right to an impartial consideration of an application for permission to appeal to the Tennessee Supreme Court from a lower appellate court is decided by the same five (5) Judges who must appoint and employ the same Tennessee Attorney General opposing such criminal defendant's application for permission to appeal?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions, Statutes and Rules Involved	1
Statement of the Case	4
Reasons for Granting the Writ	7
The Petition Should Be Granted Because It Violates Due Process And Equal Protection Of The Laws For The Same Five (5) Judges Of The Tennessee Supreme Court To Consider Whether A Criminal Defendant Should Be Granted An Appeal Which Is Opposed By The Same Tennessee Attorney General Appointed And Employed By The Same Five (5) Judges.	7
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Alley v. State, 882 S.W. 2d 810 (Tenn. Crim. App. 1994) 12, 13

Coffman v. Bomar, 220 F. Supp. 343 (M.D. Tenn. 1963) 11

State v. Tate, 925 S.W. 2d 548 (Tenn. Crim. App. 1995) 8, 9, 11, 13, 14

State of Tennessee v. Michael Gentry, C.C.A. No. 01C01-9510-CC-00336 ..... 1, 5

Ward v. Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972) 11

Statutes Cited:

Tennessee Code Annotated, § 8-6-101 ..... i, 2, 4, 8, 9

Tennessee Code Annotated, § 8-6-102 10

Tennessee Code Annotated, § 8-6-109(b)(2) 2

Tennessee Code Annotated, § 39-16-402(a)(5) 5

28 U.S.C. § 1257(a) 1

Contents

Page

United States Constitution Cited:

Fifth Amendment 9

Fourteenth Amendment 1, 4, 5, 8, 9, 11, 13

Rules Cited:

Rules of the Tennessee Supreme Court, Code of Judicial Conduct, Rule 10, Canon 2A 3, 12

Rules of the Tennessee Supreme Court, Code of Judicial Conduct, Rule 10, Canon 3E(1) 3, 12

Tennessee Rules of Appellate Procedure, Rule 11 .....5, 7, 8, 9, 10, 11, 12, 15

Tennessee Rules of Appellate Procedure, Rule 11(a) .. 2, 4, 5

Tennessee Rules of Appellate Procedure, Rule 11(e) .. 3

Other Authority Cited:

Tennessee Constitution, Article VI, Section 5 ... i, 2, 4, 5, 8, 9

APPENDIX

Appendix A — Order of the Supreme Court of Tennessee at Nashville Filed July 7, 1997 ..... 1a

Appendix B — Motion for Recusal or Disqualification Filed January 27, 1997 ..... 2a

Contents

	Page
Appendix C — Opinion of the Court of Criminal Appeals of Tennessee at Nashville Filed November 8, 1996	6a
Appendix D — Per Curiam Order of the Supreme Court of Tennessee at Nashville Denying Petition for Rehearing Filed July 28, 1997	13a

Petitioner, Michael Gentry, ("Mr. Gentry"), respectfully requests that a writ of certiorari be issued to review the Judgment below of the Tennessee Supreme Court.

OPINIONS BELOW

The Opinion of the Tennessee Court of Criminal Appeals, filed November 8, 1996, below in the case of *State of Tennessee v. Michael Gentry*, C.C.A. No. 01C01-9510-CC-00336, is not published but is included within the Appendix to this Petition. The two (2) Orders of the Tennessee Supreme Court of July 7, 1997, denying Mr. Gentry's Application for Permission to Appeal under Rule 11 of the Tennessee Rules of Appellate Procedure, and of July 28, 1997, denying Mr. Gentry's Petition to Rehear, are also not published but can be found in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The Judgment or Order of the Tennessee Supreme Court was entered on July 7, 1997, and a timely Petition to Rehear that Order was entered July 28, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part as follows:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, Section 5 of the Tennessee Constitution states in pertinent part:

> An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years.

Tennessee Code Annotated Section 8-6-101 states in pertinent part:

> The attorney general and reporter for the state is appointed by the judges of the supreme court. The term of office is eight (8) years. A certificate of appointment, signed by all the judges, shall be entered upon the minutes of the court at the first session thereafter at Knoxville, Nashville, and Jackson, respectively. The attorney general and reporter shall qualify and perform the duties of the office as required by law, and subject to the penalties imposed by law.

T.C.A. 8-6-109(b)(2) provides in pertinent part:

> The Attorney General and Reporter, or assistants acting at the Attorney General and Reporter's discretion, have the following duties: . . . To attend to all business of the state, both civil and criminal, in the court of appeals, the court of criminal appeals, and the supreme court . . .

Rule 11(a) of the Tennessee Rules of Appellate Procedure provides as follows:

> An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and

> in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Rule 11(e) of the Tennessee Rules of Appellate Procedure provides in pertinent part:

> The application shall be granted if two members of the Supreme Court are satisfied that the application should be granted.

Canon 2A of Rule 10 of the Code of Judicial Conduct of the Rules of the Tennessee Supreme Court states:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3E(1) of Rule 10 of the Code of Judicial Conduct states in pertinent part:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .

STATEMENT OF THE CASE

The fundamental question raised by Mr. Gentry's Petition for Writ of Certiorari is whether it is unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution for the same five (5) Judges of the Tennessee Supreme Court to consider whether a criminal defendant should be granted an application for permission to appeal from a lower appellate court judgment below where the application is being opposed by the same Tennessee Attorney General which the five Judges appointed and employed to respond to such an application in behalf of the State of Tennessee. Does an impartial appellate review process or appearance of an impartial appellate review process, demanded by due process and equal protection of the laws before a state's highest court, require the absence of an employer-employee relationship between a state's highest court and the highest legal representative of the state opposing said criminal defendant's access to such appellate review? If Mr. Gentry's rights of Due Process of Law and Equal Protection of the Laws protected by the Fourteenth Amendment of the United States Constitution require no appointment or employment connection between the highest state court and the representative of the sovereign opposing a criminal defendant's right to consideration of judicial review on an appeal to said highest state court in order to preserve the impartiality of the judiciary and the appearance of the impartiality of the judiciary, then Article VI, Section 5 of the Tennessee Constitution and T.C.A. 8-6-101 must be held unconstitutional by the United States Supreme Court.

The issue of whether the Tennessee Supreme Court should have recused itself and requested that the Governor of the State of Tennessee appoint a Special Supreme Court to determine Mr. Gentry's Application for Permission to Appeal under Rule 11(a)

of the Tennessee Rules of Appellate Procedure was presented to the Tennessee Supreme Court by Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal, filed January 7, 1997. The Application for Permission to Appeal was filed to request that the Tennessee Supreme Court review the Judgment or Opinion of the Tennessee Court of Criminal Appeals of November 8, 1996, in *State of Tennessee v. Michael Gentry*, C.C.A. No. 01C01-9510-CC-00336, which affirmed the Judgment of the Trial Court below which refused to grant judicial diversion to Mr. Gentry upon entry of a plea bargain agreement requiring him to enter a plea of guilty to one count of official misconduct under T.C.A. 39-16-402(a)(5).

In Mr. Gentry's Application for Permission to Appeal, *before* Mr. Gentry briefed the merits of the issues addressed by the Tennessee Court of Criminal Appeals below, Mr. Gentry asked the Tennessee Supreme Court to find that Article VI, Section 5 of the Tennessee Constitution and T.C.A. 8-6-101, both of which require the Tennessee Attorney General to be appointed and thereby employed by the Judges of the Tennessee Supreme Court, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and thereby requires the Tennessee Supreme Court to do one of two things: To either: (1) disqualify the current Tennessee Attorney General which had been appointed and employed by the Judges of the Tennessee Supreme Court and request that the Governor of the State of Tennessee appoint a Special Attorney General for purposes of responding to the T.R.A.P. 11 Application of Mr. Gentry; or (2) recuse the current five (5) Judges of the Tennessee Supreme Court from considering whether Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal should be granted where it was opposed by the Tennessee Attorney General appointed and employed by these same judges and to request that the Governor of the State of Tennessee appoint a Special Supreme Court for purposes of considering Mr. Gentry's Application for Permission to Appeal.

After the Tennessee Attorney General filed a response to Mr. Gentry's Application for Permission to Appeal, wherein the Tennessee Attorney General opposed the Tennessee Supreme Court granting his Application for Permission to Appeal and relief from the Judgment of the Court of Criminal Appeals below, Mr. Gentry further filed on January 27, 1997, a Motion for Recusal or Disqualification. The Motion for Recusal or Disqualification moved the Tennessee Supreme Court for an Order

> either (1) disqualifying or recusing the Attorney General of the State of Tennessee from participating in this case before the Tennessee Supreme Court, ordering his Response to Mr. Gentry's T.R.A.P. 11 Application withdrawn and requesting the Governor of the State of Tennessee to appoint a Special Attorney General to represent the interests of the State of Tennessee in this appeal *before* the Tennessee Supreme Court considers a Response by the State of Tennessee to Mr. Gentry's pending T.R.A.P. 11 Application *or* (2) disqualifying or recusing the current Tennessee Supreme Court from considering Mr. Gentry's pending T.R.A.P. 11 Application for Permission to Appeal and requesting the Governor of the State of Tennessee to appoint a Special Tennessee Supreme Court that has *not* appointed the Tennessee Attorney General and has *no* ties, links or connections with the Tennessee Attorney General.

On July 7, 1997, the Tennessee Supreme Court entered an Order wherein it denied the Application for Permission to Appeal but did *not* address the pending Motion for Recusal or Disqualification which was *not* opposed by any response filed to said Motion.

On July 17, 1997, Mr. Gentry filed a timely Petition to Rehear the denial of his Application for Permission to Appeal by Order of July 7, 1997, on the grounds that the Tennessee Supreme Court denied the Application

> without ruling upon his pending Motion for Recusal or Disqualification, filed January 27, 1997, to which Respondent, the State of Tennessee, *elected not to oppose* and, in fact, did not even file a response.

On July 28, 1997, the Tennessee Supreme Court found Mr. Gentry's arguments in his Petition to Rehear "to be without merit" and denied the Petition to Rehear the denial of his T.R.A.P. 11 Application for Permission to Appeal.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE IT VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS FOR THE SAME FIVE (5) JUDGES OF THE TENNESSEE SUPREME COURT TO CONSIDER WHETHER A CRIMINAL DEFENDANT SHOULD BE GRANTED AN APPEAL WHICH IS OPPOSED BY THE SAME TENNESSEE ATTORNEY GENERAL APPOINTED AND EMPLOYED BY THE SAME FIVE (5) JUDGES.

As far as Mr. Gentry can determine through thorough research of the laws and court decisions of all fifty States in the United States, Tennessee is the *only* state whose Attorney General is appointed and employed by the highest state court, the Tennessee Supreme Court, for, in part, contesting the appeals of criminal defendants before the Tennessee Supreme Court. The fact that the same five (5) Judges of the Tennessee Supreme Court appoint and employ the same Tennessee Attorney General

opposing a criminal defendant's Application for Permission to Appeal creates actual partiality or an appearance of partiality which unconstitutionally taints the appellate review process by the Tennessee Supreme Court. There are no reported state or federal cases addressing the application of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to these peculiar facts and the peculiar provision of the Tennessee Constitution, Article VI, Section 5, which requires the five (5) Judges of the Tennessee Supreme Court to appoint and thereby employ the Tennessee Attorney General whose duties are to be exercised on behalf of the sovereign, the State of Tennessee. *See, e.g., State v. Tate*, 925 S.W. 2d 548, 555 (Tenn. Crim. App. 1995), defining the duties of an Attorney General in Tennessee as

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Further, the United States Supreme Court should grant Mr. Gentry's Petition for Writ of Certiorari to determine whether the relationship between the Tennessee Supreme Court and Tennessee Attorney General as required by the Tennessee Constitution and Tennessee statute, T.C.A. 8-6-101, unconstitutionally deprived Mr. Gentry of an impartial consideration or the appearance of an impartial consideration of his T.R.A.P. 11 Application for Permission to Appeal in accordance with the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Tennessee Supreme Court erred in denying Mr. Gentry's

T.R.A.P. 11 Application for Permission to Appeal before ruling on his Motion to Recuse or for Disqualification. Moreover, the Tennessee Supreme Court erred in refusing to rule on the Motion directly at all, a Motion which went *unopposed* by the Tennessee Attorney General. The Tennessee Supreme Court did not ever address the Motion even though it was asked to on Petition to Rehear, which was simply denied on July 28, 1997. Mr. Gentry contends that his rights of due process of law and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution are violated if his right to a T.R.A.P. 11 review by the highest state court of last resort, the Tennessee Supreme Court, is contingent upon the Court considering the argument and position of the Tennessee Attorney General contesting Mr. Gentry's appeal *because* the selection, appointment, and employment of the Tennessee Attorney General is made by the Tennessee Supreme Court, creating the *appearance* of "a position of divided loyalties" and thus an inherent conflict of interest and appearance of impropriety or partiality. This conflict of interest can only be cured either: (1) by the Court recusing the Tennessee Attorney General and permitting the Governor of the State of Tennessee to appoint a Special Attorney General to represent the interest of the State of Tennessee in this appeal *before* the Tennessee Attorney General's Response to this Application is considered; *or* (2) by the Tennessee Supreme Court recusing itself and permitting the Governor of the State of Tennessee to appoint a Special Tennessee Supreme Court with *no ties, links, or connections with* the Tennessee Attorney General. *State v. Tate*, 925 S.W. 2d 578, 553 (Tenn. Crim. App. 1995).

Article VI, Section 5 of the Tennessee Constitution and T.C.A. 8-6-101, both of which require the Tennessee Attorney General to be appointed by the Judges of the Supreme Court, violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States

Constitution. The state constitutional and statutory requirement that the Tennessee Attorney General be appointed by the judges of the Tennessee Supreme Court creates the appearance of "divided loyalties" or a conflict of interest. The very Court which must determine the rightness of Mr. Gentry's appeal and whether to grant his T.R.A.P. 11 Application must consider the opposition contention of the State of Tennessee through the "executive head" of the legal department of the State of Tennessee, the Tennessee Attorney General, *see* T.C.A. 8-6-102, which the Tennessee Supreme Court appointed. *The Tennessee Attorney General is beholden to the Tennessee Supreme Court for his job and presumably the Tennessee Supreme Court can terminate the appointment of the Tennessee Attorney General at any time.* The Tennessee Supreme Court is the employer, and the Tennessee Attorney General is the employee. Clearly, due process and equal protection principles forbid judges from adjudicating disputes involving their own employees. It is impossible to avoid partiality or the appearance of partiality. Therefore, to insure that Mr. Gentry receives due process of law and equal treatment under the laws *before* his T.R.A.P. 11 Application is considered, there should have been a Special Supreme Court appointed or a Special Attorney General appointed to insure no conflict of interest or no appearance of partiality or impropriety in the appellate review process.

This is a very important issue of public interest and an important question of law which has never been addressed by *any* court. Is there an unconstitutional *appearance* of impropriety and partiality or *appearance* of divided loyalty when the Tennessee Supreme Court, consisting of five Judges who must at all times act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary," selects the Tennessee Attorney General, causes him or her to be employed and is always in an employer-employee or principal-agent relationship with the Tennessee Attorney General, who must

contest the claims of a criminal defendant making T.R.A.P. 11 Application to the Tennessee Supreme Court?

Due process of law requires "a neutral and detached judge in the first instance." *Ward v. Monroeville*, 409 U.S. 57, 62, 93 S. Ct. 80, 34 L. Ed. 2d 267, 272 (1972). In certain situations, due process forbids a public official from occupying two "inconsistent positions, one partisan and the other judicial." *Ward v. Monroeville*, 409 U.S. at 60, 34 L. Ed. 2d at 271. Mr. Gentry contends that the line of constitutionality is crossed where the judges of the Tennessee Supreme Court are required to be the employers of the Tennessee Attorney General, whose job it is to contest the claims of a criminal defendant filing a T.R.A.P. 11 Application for Permission to Appeal before the very court that has employed him. This employer-employee relationship also creates a principal-agent relationship with the chief legal officer of the executive branch. By operation of the employer-employee relationship and the principal-agent relationship theory, the appointing or employment requirement imposed upon the Judges of this Court therefore creates the impression of a conflict and actual conflict that violates due process of law. The appearance of "divided loyalties" or a conflict of interest in a similar circumstance has been found prohibited in at least one reported Tennessee decision. *See State v. Tate*, 925 S.W. 2d 548, 553 (Tenn. Crim. App. 1995).

A criminal defendant filing a T.R.A.P. 11 Application for Permission to Appeal, such as Mr. Gentry, is also entitled to equal protection of the laws in having his T.R.A.P. 11 Application considered. Although, according to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution:

> a state may not be constitutionally required to provide a system of appellate review, if it elects to do so its benefits must be made available on a basis of substantial equality to all alike.

Coffman v. Bomar, 220 F. Supp. 343, 349 (M.D. Tenn. 1963).

Where there is an Attorney General selected and employed by the Tennessee Supreme Court to contest a criminal defendant's T.R.A.P. 11 Application, thus creating an *appearance* of a conflict of interest, "divided loyalties," or partiality or impropriety, a Tennessee criminal defendant's review of his appeal by the highest court of the State of Tennessee is not on equal basis with other T.R.A.P. 11 Applicants who come before the Tennessee Supreme Court in civil cases without an attorney opposing them on the other side who has been appointed and employed by the Tennessee Supreme Court to represent the other side and to contest the civil applicant's claims. There is no rational basis for this disparity in treatment.

Federal due process and equal protection under the laws require the Tennessee Supreme Court to adhere to its own Canons of Judicial Conduct. It has not done so. Canon 2A of Rule 10 of the Rules of the Tennessee Supreme Court states:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3E(1) states in part:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . .

According to *Alley v. State*, 882 S.W. 2d 810, 820 (Tenn. Crim. App. 1994):

> Any time a motion to recuse is made, a judge should grant the motion whenever his or her impartiality might reasonably be questioned.

Recusal is

> warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.

Id.

A "trial judge must consider a motion to recuse objectively as well as subjectively." *Id.* at 821.

> When considering a motion to recuse, a trial judge must consider more than whether or not the judge has a personal bias . . . . To maintain public confidence, courts must avoid the appearance of partiality as well as partiality itself.

Alley v. State, *supra* at 822-823. The Tennessee Court of Criminal Appeals in *Alley v. State* did not question the trial judge's intentions or his determination "from a subjective, personal viewpoint that recusal is not necessary." *Id.* at 823. The court deemed "recusal appropriate in this case in order to avoid the public appearance of partiality." *Id.* at 823.

State v. Tate, 925 S.W. 2d at 558, holds that in Tennessee, the "perception of a fair trial is just as important as the reality." The same should hold true for the perception of a fair appellate review process by Tennessee's highest court under the Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Indeed, attorneys and judges "must not only avoid impropriety but even the appearance of impropriety." *Id.* at 555.

The

> Attorney General, as the representative of the people in the State criminal prosecutions, must always endeavor to promote the public confidence in the integrity and impartiality of the Criminal Justice System.

Id.

Likewise, the same must hold true for appellate judges and

> Anything that reflects upon the majesty of the law and the absolute and complete impartiality of those that conduct [appellate] proceedings, must be avoided scrupulously. We cannot allow public confidence in the complete fairness and impartiality of our tribunals to be eroded and nothing which casts any doubt on the fairness of the proceedings should be tolerated.

Id.

CONCLUSION

Mr. Gentry therefore very respectfully requests this Court grant this Petition, reverse the two (2) Tennessee Supreme Court Orders below, and hold that the Tennessee Supreme Court erred in refusing to disqualify the Attorney General and order that his Response to Mr. Gentry's T.R.A.P. 11 Application be withdrawn and a Special Attorney General be appointed by the Governor before the issues raised by Mr. Gentry's T.R.A.P. 11 Application are considered by the Tennessee Supreme Court *or* to order that the Tennessee Supreme Court be disqualified and a Special Supreme Court be appointed by the Governor of the State of Tennessee to consider the issues raised by Mr. Gentry in his T.R.A.P. 11 Application for Permission to Appeal.

Respectfully submitted,

J. RUSSELL HELDMAN
Counsel of Record
WILLIAMS & HELDMAN
Attorneys for Petitioner
320 Main Street
Suite 101
Franklin, Tennessee 37064
(615) 794-7100

APPENDIX A — ORDER OF THE SUPREME COURT OF TENNESSEE AT NASHVILLE FILED JULY 7, 1997

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

WILLIAMSON CRIMINAL

No. O1C01-9510-CC-00336

STATE OF TENNESSEE,

Appellee,

v.

MICHAEL GENTRY,

Appellant.

ORDER

Upon consideration of the application for permission to appeal and the record before us, the application is denied.

PER CURIAM

APPENDIX B — MOTION FOR RECUSAL OR DISQUALIFICATION FILED JANUARY 27, 1997

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Williamson Criminal No. I-794-195-A

Appeal No. 01C01-9510-CC-00336

STATE OF TENNESSEE,

Plaintiff/Respondent,

v.

MICHAEL GENTRY,

Defendant/Applicant.

MOTION FOR RECUSAL OR DISQUALIFICATION

Defendant/Applicant, Michael Gentry, respectfully moves the Tennessee Supreme Court for an Order either (1) disqualifying or recusing the Attorney General of the State of Tennessee from participating in this case before the Tennessee Supreme Court, ordering his Response to Mr. Gentry's T.R.A.P. 11 Application withdrawn and requesting the Governor of the State of Tennessee to appoint a Special Attorney General to represent the interests of the State of Tennessee in this appeal *before* the Tennessee Supreme Court considers a Response by the State of Tennessee to Mr. Gentry's pending T.R.A.P. 11 Application *or* (2) disqualifying or recusing the current Tennessee Supreme Court from considering Mr. Gentry's pending T.R.A.P. 11 Application for Permission to Appeal and requesting the Governor of the State of Tennessee to appoint a

Appendix B

Special Tennessee Supreme Court that has *not* appointed the Tennessee Attorney General and has *no* ties, links or connections with the Tennessee Attorney General.

Grounds for this Motion are that by pages 26-27 of Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal, filed January 7, 1997, Mr. Gentry has challenged the constitutionality of Article VI, Section 5 of the Tennessee Constitution and T.C.A. 8-6-101, both of which require the Tennessee Attorney General to be appointed by the judges of the Tennessee Supreme Court, as violative of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as the comparable due process and equal protection clauses of Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution. *See* Exhibit "A." Mr. Gentry contends that the Tennessee constitutional and statutory requirements that the Tennessee Attorney General be appointed by the judges of the Tennessee Supreme Court creates the appearance of "divided loyalties" or a conflict of interest when a criminal defendant's T.R.A.P. 11 Application for Permission to Appeal is pending before the Tennessee Supreme Court and the State of Tennessee is represented by an Attorney General who has been hand picked by the judges of the Tennessee Supreme Court. The Tennessee Attorney General is beholden to the Tennessee Supreme Court for his employment and presumably the Tennessee Supreme Court can terminate the appointment of the Tennessee Attorney General at any time. Therefore, under the current system, to insure that a criminal defendant who has filed a T.R.A.P. 11 Application, such as Mr. Gentry, receives federal and state due process of law and equal treatment under the laws *before* the Defendant's T.R.A.P. 11 Application is considered, there must be a Special Supreme Court appointed or a Special Attorney General appointed. This

is to insure no conflict of interest or appearance of partiality or impropriety in the appellate review process and that due process of law and equal treatment under the laws under federal and state constitutional provisions are not violated.

Attorney General Charles W. Burson has filed a Response to Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal wherein on pages 12-13 he has gone on the record as contesting the issue and taken the position that due process and equal protection are not violated if Mr. Gentry's T.R.A.P. Application is reviewed by the Tennessee Supreme Court even though it has appointed the chief executive head of the legal department for the State of Tennessee who is appearing in opposition to his T.R.A.P. 11 Application. *See* Exhibit "B." Now the issue is ripe for review by this Court which first should either (1) order the Tennessee Attorney General to be recused or disqualified, his Response withdrawn and a Special Attorney General appointed by the Governor for purposes of reviewing of this T.R.A.P. Application or (2) order a Special Supreme Court appointed by the Governor to review Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal while the State of Tennessee, opposing the Application, is being represented by the Tennessee Attorney General this Court has selected and caused to be employed and who is now Mr. Gentry's adversary opposing his T.R.A.P. 11 Application.

Accordingly, for the reasons set forth herein, in his T.R.A.P. 11 Application and in an accompanying Memorandum of Law, Applicant, Michael Gentry, respectfully requests this Court to order that a Special Attorney General be appointed before considering this T.R.A.P. 11 Application *or* order that a Special Supreme Court be appointed to review the constitutional issue and other issues raised by Mr. Gentry's T.R.A.P. 11 Application for Permission to Appeal.

Appendix B

ERNEST W. WILLIAMS (#7250)
J. RUSSELL HELDMAN (#9989)
320 Main Street, Suite 101
Franklin, TN 37064
(615) 794-7100

By s/ Ernest W. Williams
Attorneys for Applicant, Michael Gentry

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been mailed to Charles W. Burson, State Attorney General, 500 Charlotte Avenue, Nashville, TN 37243-0497 and Elizabeth T. Ryan, Assistant Attorney General, 450 James Robertson Parkway, Nashville, TN 37243-0493, this 27th day of January, 1997.

s/ J. Russell Heldman

APPENDIX C — OPINION OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE FILED NOVEMBER 8, 1996

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT NASHVILLE

SEPTEMBER 1996 SESSION

C.C.A. # 01C01-9510-CC-00336

WILLIAMSON COUNTY

Hon. Donald P. Harris, Judge

(Judicial Diversion)

STATE OF TENNESSEE,

Appellee,

VS.

MICHAEL GENTRY,

Appellant.

For Appellant:

Ernest W. Williams and
J. Russell Heldman
Attorneys at Law
320 Main Street, Suite 101
Franklin, TN 37064

For Appellee:

Charles W. Burson
Attorney General & Reporter

Elizabeth T. Ryan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243 0493

Appendix C

Joseph D. Baugh
District Attorney General
P.O. Box 937
Franklin, TN 37065-0937

Ronald L. Davis
Assistant District Attorney General
P.O. Box 937
Franklin, TN 37065-0937

OPINION FILED: NOV 8 1996

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Michael Gentry, entered a plea of guilt to one count of official misconduct. Tenn. Code Ann. § 39-16-402(a)(5). Pursuant to a plea agreement, the trial court imposed a Range I sentence of two years and granted probation but denied the defendant's request for judicial diversion. Tenn. Code Ann. § 40-35-313; *State v. Dishman*, 915 S.W.2d 458 (Tenn. Crim. App. 1995). In this appeal, the defendant claims that the trial court abused its discretion by refusing to grant judicial diversion; he also insists that the district attorney general was guilty of prosecutorial vindictiveness.

We affirm the judgment of the trial court.

On July 11, 1994, the defendant and Katrina Greer, both of the Franklin Police Department, were indicted on two counts of

official misconduct, two counts of soliciting unlawful compensation, and one count of conspiracy. At the time, the defendant was a sergeant of the Williamson County DUI Task Force, a body comprised of two officers from the Franklin Police Department and one each from the Brentwood Police, the Fairview Police, and the Williamson County Sheriff's Department. The defendant supervised all task force activities. During Christmas of 1993, the defendant authorized for himself and the other officers in the task force holiday pay even though no work would actually take place. A subsequent investigation established that the defendant and Ms. Greer were the only two task force members who had made claims for and received the unwarranted holiday pay. The defendant was untruthful when questioned by his lieutenant during the initial stages of the investigation.

Initially, the state had offered to allow the defendant to plead guilty to one count of official misconduct, be granted probation, and then, upon successfully completing a two-year probationary period, have his record expunged under the provisions of judicial diversion. That offer, however, was made contingent upon the codefendant, Ms. Greer, accepting the same terms. Ms. Greer declined.

Several months later, a trial ensued. During the defendant's testimony, the state again offered a plea agreement. As to Ms. Greer, however, the period of probation was increased by one year from the original proposal and, as to the defendant, the terms were the same except that the judicial diversion offer was withdrawn. Each accepted the terms of the new plea agreement. At the sentencing hearing, the state opposed the defendant's request for judicial diversion.

Appendix C

The trial court denied the application on the basis that the defendant had been untruthful during the course of the investigation and had presented witnesses "for the purpose of creating an impression with the jury that he and Ms. Greer did work." The trial court ultimately ruled that because the defendant held a responsible, public position, had violated the trust incident to the office, and had been less than candid during the various stages of the proceedings, the request for judicial diversion should be denied.

Judicial diversion is authorized by statute. It is reserved for "any person who has not previously been convicted of a felony or a Class A misdemeanor." Tenn. Code Ann. § 40-35-313(a)(1). It is available only to those who either plead guilty or are found guilty of "a misdemeanor which is punishable by imprisonment or a Class C, D, or E felony." *Id.* The statute authorizes the trial court to place the defendant "on probation upon such reasonable conditions as it may require and for a period of time not less than the maximum sentence for the misdemeanor . . . or . . . the felony with which he is charged." *Id.* In the event the defendant satisfactorily completes his probationary term, he is entitled to a discharge and dismissal. Tenn. Code Ann. § 40-35-313(a)(2). The effect of the dismissal is "to restore [the defendant] to the status he occupied before such arrest or indictment or information." Tenn. Code Ann. § 40-35-313(b). *State v. Evitts*, 915 S.W.2d 468 (Tenn. Crim. App. 1995).

The grant of judicial diversion is within the discretion of the trial court. Only an abuse of that discretion warrants a reversal. *State v. Bonestel*, 871 S.W.2d 163 (Tenn. Crim. App. 1993). In this case, the decision of the trial court clearly had a rational basis. The defendant, a veteran police officer in charge of the task force, qualified as a public employee entrusted with

an important role of responsibility. The plan to acquire unearned pay and the ensuing coverup lasted for a period of weeks. The defendant and at least one other person participated in the plan. His lack of candor during the investigation militates against the grant of a more lenient sentence.

That is not to say, of course, that the defendant did not present a persuasive claim. At the time of trial, the 33-year-old defendant had an impressive record. Father of three children, he had graduated from high school and had attended Austin Peay University. He spent four years in the United States Marine Corps and was in the Presidential Guard Service. He received several awards while in the Marines and currently serves in the Tennessee Army National Guard. He has training in accident investigation, accident reconstruction, and several other fields of expertise. While the defendant may have been a worthy candidate for the judicial diversion program, this court must defer to the judgment of the trial court which, after having observed the demeanor of the defendant and other witnesses, found reasonable grounds for denial.

The claim of prosecutorial vindictiveness also has no merit. This defense is most commonly addressed when the defendant has been reindicted on a more serious charge in retaliation for the exercise of a constitutional right. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098 (1974); *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981). In *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), the term was described as follows:

> "Prosecutorial vindictiveness" is a term of art with a precise and limited meaning. The term refers to a situation in which the

> government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. . . .
>
> The Supreme Court has established two ways in which a defendant may demonstrate prosecutorial vindictiveness. First, the defendant may show "actual vindictiveness" — that is, *he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights.* This showing is, of course, exceedingly difficult to make. Second, *a defendant may in certain circumstances rely on a presumption of vindictiveness; when the facts indicated "a realistic likelihood of 'vindictiveness[,]' " a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action.* If the government produces such evidence, the defendant's only hope is to prove that the justification is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively.

Id. at 1245 (emphasis added) (citations omitted).

In this instance, of course, there was no reindictment. An offer of settlement which had been made by the state and rejected by the defense several months before was simply no longer on

the table. The record does not establish that the state, by refusing to agree to judicial diversion at the later date, attempted to further punish the defendant. In fact, other information, perhaps not available when the first offer was made, had likely come into the hands of the state by the time the new offer was proposed. Moreover, in *State v. Turner*, 919 S.W.2d 346, 360 (Tenn. Crim. App. 1995), this court held that the issue of prosecutorial vindictiveness had been waived when the defendant has knowingly and voluntarily entered the plea of guilt. That is, of course, the very case here. By accepting the revised offer, the defendant gave up his right to complain.

Accordingly, the judgment is affirmed.

s/ Gary R. Wade
Gary R. Wade, Judge

CONCUR:

s/ Paul G. Summers
Paul G. Summers, Judge

s/ L.T. Lafferty
L.T. Lafferty, Special Judge

APPENDIX D — PER CURIAM ORDER OF THE SUPREME COURT OF TENNESSEE AT NASHVILLE DENYING PETITION FOR REHEARING FILED JULY 28, 1997

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Williamson Criminal
No. I-794-195-A

Appeal No. 01C01-9510-CC-00336

STATE OF TENNESSEE,

Plaintiff/Respondent,

v.

MICHAEL GENTRY,

Defendant/Applicant.

ORDER

The applicant, Michael Gentry, has filed a petition to rehear the denial of his Rule 11 application. We have considered all of the arguments in the petition, and we have found them to be without merit.

Accordingly, after due consideration, the petition for rehearing is denied. Entered this 28th day of August, 1997.

PER CURIAM